Supreme Court, U.S.
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CASE NO. 86-1649

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE STATE OF OHIO; THE OHIO DEPARTMENT OF AGRICULTURE; DALE LOCKER, DIRECTOR OF THE OHIO DEPARTMENT OF AGRICULTURE; ERIC NELSON, HARDIN COUNTY BEE INSPECTOR,

Appellants,

v.

WILLIAM P. ALLINDER AND CAROLINE I. ALLINDER d/b/a SUNNYSIDE BEE FARM; ELMER STEINER AND MARILYN L. STEINER,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO MOTION OF APPELLEES TO DISMISS OR AFFIRM

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GROUNDS FOR PLENARY CONSIDERATION

1. AN APPEAL FROM THE DECISION BELOW IS PROPER SINCE THE DECISION OF THE COURT OF APPEALS IS A FINAL ORDER. IN THE ALTERNATIVE, THE COURT MAY CONSIDER THIS APPEAL AS A PETITION FOR CERTIORARI.

The United States Court of Appeals for the Sixth Circuit has made a final determination that Ohio Revised Code ("ORC") §909.05 is unconstitutional in that it authorizes nonconsensual warrantless inspections of apiaries. Although the appellees herein have initiated several constitutional challenges of other related statutory provisions, the appellees have made no further constitutional challenges to ORC §909.05.

This Court's decision with regard to the warrant requirement for conducting administrative inspections of apiaries would be dispositive of other issues pending in the courts below. Appellees have argued that the Ohio Department of Agriculture must provide notice to apiary owners prior to the time a warrant is sought and again prior to the time such a warrant is executed. These issues have been briefed in the federal district court, but further consideration has been stayed pending this Court's determination with regard to the requirement of a warrant. If this Court determines that a warrant is not required to inspect an apiary, these other pending issues will become moot.

Further, there is some question whether the finality requirement applies to all appeals brought pursuant to 28 U.S.C.§1254(2). In *City of New Orleans v. Dukes,* 427 U.S. 297, 301 (1976), this Court stated in pertinent part:

> There may be some question as to the continuing vitality of the finality requirement in the context of §1254(2), which unlike such jurisdictional statutes as 28 U.S.C. §1257 and 28 U.S.C. §1291 has no 'finality' provision in the statute itself.

A recent U.S. Supreme Court decision has provided guidance with regard to the finality requirement where there are further factual disputes to be resolved. The Court stated the following in *Thornburgh v. American College of Obstetricians and Gynecologists,* 106 S. Ct. 2169, 2176 (1986):

> . . . where the judgment is not final, and where the case is remanded for further development of the facts, we have no appellate jurisdiction under §1254(2).

In the present case, there are no additional facts which must be developed in order to determine the constitutionality of ORC §909.05. Accordingly, this Court's jurisdiction over the instant appeal is proper.

Assuming arguendo that the appeal is not proper in this case, the Court may consider the jurisdictional statement as a petition for certiorari. 28 U.S.C. §2103 provides in pertinent part:

> If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States Court of Appeals, in a case where the proper mode of review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ

> of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken . . .

On numerous occasions this Court has dealt with the finality question by treating the appeal as a petition for certiorari and then granting certiorari. *El Paso v. Simmons*, 379 U.S. 497, 501-03 (1965); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1975); *Calder v. Jones*, 465 U.S. 783 (1984). This approach to the finality problem has been utilized because there is no finality requirement for a petition for certiorari. *See* Stern, Gressman and Shapiro, *Supreme Court Practice*, §2.2 (6th Ed. 1986).

Accordingly, the question of finality is merely academic in the present case. The Court should consider the important issue presented either in the context of an appeal or in the context of a petition for certiorari.

2. THE APPELLANTS HAVE STANDING AND THEY HAVE PERFECTED A PROPER APPEAL TO THIS COURT.

The instant appeal was brought by the State of Ohio; the Ohio Department of Agriculture; Dale Locker, Director of the Ohio Department of Agriculture; and Eric Nelson, Hardin County Bee Inspector. All four appellants have standing because they have a direct interest in upholding the constitutionality of ORC §909.05, inasmuch as they are involved in implementing its provisions and since they have been restrained from carrying out its implementation. Although the United States Court of Appeals for the Sixth Circuit has remanded the case to the district court with instructions to dismiss the State of Ohio and the Ohio Department of Agriculture as defendants, the district

court has not yet issued its order of dismissal. Accordingly, all four appellants have standing to appeal the decision below.

Assuming arguendo that Dale Locker, the Director of the Ohio Department of Agriculture, and Eric Nelson, a Hardin County bee inspector, are the only appellants with standing to pursue the instant appeal, these two appellants have perfected a proper appeal to this Court. The question presented by their Jurisdictional Statement does address their interest in the appeal.

Although the question presented refers expressly to the prohibition against the "State", a prohibition against the state is a prohibition with regard to a director of a state department and an employee of a state in their work for the state. Rule 15.1(a) of the Rules of the Supreme Court of the United States provides in pertinent part:

> . . . The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. . .

A subsidiary question of whether a state is prohibited from conducting nonconsensual, warrantless administrative inspections is whether state employees are prohibited from conducting such inspections. This is true since a state can act only through its agents and employees. To say that a state is prohibited from taking certain action has no meaning if the state's agents and employees are not bound by such prohibition. Although the State of Ohio and the Ohio Department of

Agriculture will be dismissed as defendants in the court below, the inspections at issue are still state inspections carried out by state employees pursuant to a heretofore valid state statute.

In view of the foregoing, the appellants herein have standing and they have presented a proper statement of the issue.

3. THE QUESTION PRESENTED IS SUBSTANTIAL.

The most clear indication that the issues presented in this case are substantial is this Court's decision to grant certiorari in two other cases pertaining to statutes permitting warrantless administrative inspections. Both *New York v. Burger*, 493 N.E.2d 926 (1986), cert. granted 107 S. Ct. 61 (1986), and *Illinois v. Krull*, 481 N.E.2d 703 (1985), cert. granted 106 S. Ct. 1456 (1986) are important cases presently pending before this Court. The plenary consideration of the instant appeal will help further clarify the law evolving in the area of warrantless inspections and searches.

Further, the question presented is substantial in that its resolution has the potential to revolutionize the apiary inspection process throughout most of the country. At present, few if any states have been saddled with the requirement of a warrant or consent to inspect apiaries. Such requirement would create an undue burden on an inspection process which has worked well for almost 75 years in some states. It is important to note that the inspection of apiaries is essential in maintaining a bee population free from disease. Without bees it is impossible to pollinate trees and crops.

In short, the issues presented for review are substantial in that their resolution will provide clear guidance to numerous states and federal agencies which conduct administrative inspections.

CONCLUSION

In view of the foregoing, the Court should note probable jurisdiction of this appeal and set it for argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief have been sent by regular U.S. mail this _____ day of May, 1987 to: Gregory L. Arnold, Arnold and Barrett, Suite 804, Secor Building, 425 Jefferson Avenue, Toledo, Ohio 43604.

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